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Ooi Eng Hock v Malayan Banking Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-2309–11 OF 2018
KAMALUDIN MD SAID, ABU BAKAR AND GUNALAN JJCA
26 NOVEMBER 2020

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Damages — Mitigation — Whether reasonable steps taken to mitigate loss — Bank's branch manager was sued for negligently causing customer's fixed deposit ('FD') account to be uplifted and her monies transferred to another person's account — Bank failed in attempt to trace and recover the FD monies — Bank later unilaterally entered into settlement agreement ('SA') with affected customer to repay the principal sum she had deposited in her FD account — Whether bank's attempts to trace where the FD monies went and its entering into the SA were reasonable steps taken to mitigate its loss — Whether if bank had waited for customer to sue it would have incurred greater loss — Whether just because bank did not sue person into whose account the FD monies went did not mean it failed to mitigate its loss

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The High Court had allowed the respondent's claim against the appellant ('Ooi') for breaching the terms and conditions of his contract of service and breaching his duty of care to the respondent ('MBB') when he was its branch manager. MBB alleged that without its knowledge and approval, Ooi had carried on investment scheme in concert with two other persons ('Afkariah' and 'Fauziah') to woo customers to put their monies in fixed deposits ('FDs') at his branch on the promise that they would get better returns than if they deposited their monies at other branches of MBB. In connection with that scheme, a customer ('Hamidah') had opened a FD account at Ooi's branch into which RM3.3m was deposited. Apparently, without Hamidah's consent, the FD was later uplifted and the RM3.3m transferred to the account of another person ('Mahdi'). MBB alleged that normal banking procedures were not followed in the uplifting of the FD and the depositing of the monies into Mahdi's account. Hamidah lodged a police report and demanded that MBB return her RM3.3m. MBB tried to trace where the RM3.3m went but found the monies had dissipated by the time it carried out an investigation into the affair. Following the investigation, MBB dismissed Ooi from service with immediate effect. MBB entered into a settlement agreement with Hamidah to pay her the RM3.3m in full and final settlement of her claim without admission of liability on its part. MBB's claim against Ooi was specifically in respect of the RM3.3m it had to pay Hamidah. The High Court held Ooi liable to pay MBB the said sum after finding that he had breached his duty of care to MBB and failed to exercise the care, prudence and skill required of a branch manager in allowing Hamidah's FD monies to be dissipated and thereby causing MBB to suffer the

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loss. In the instant appeal against the decision, Ooi argued, inter alia, that MBB had entered into the settlement agreement with Hamidah on its own accord and it could not recover the RM3.3m from him because: (a) he was not obliged to reimburse MBB under any indemnity provision; (b) he had not been negligent; (c) since the settlement agreement excluded admission of liability on MBB's part, he was absolved of any liability; (d) Mahdi, Afkariah and Fauziah were never called as witnesses at the trial; (e) MBB did not take reasonable steps to mitigate its loss; and (f) MBB failed to prove that it had actually suffered a loss of RM3.3m. In reply, MBB argued that the trial court had properly evaluated all the evidence and its findings and decision should not be disturbed.

Held, unanimously dismissing the appeal:

(1) MBB had rightly proven its claim against Ooi. Ooi could not show that the findings, reasoning and the decision of the High Court were unsustainable. There was no reason to disturb the findings of fact and the decision made by the High Court (see paras 23 & 50).

(2) Ooi failed to plead that because the settlement agreement expressly absolved liability on MBB's part, he could not be made liable for its payment to Hamidah. Ooi also failed to plead the need for MBB to initiate an action for indemnity or a third-party claim against him. Ooi's omissions to plead these defences meant MBB's claim had to be sustained by the court. It was a fundamental principle of law that a matter had to be pleaded for it to be litigated and decided by the court (see paras 29–32).

(3) The High Court correctly found that MBB had incurred the loss of RM3.3m which was the sum it paid Hamidah as a consequence of Ooi's negligence. Hence, there was no reason for Ooi to submit that MBB had not proven its damages of RM3.3m (see para 37).

(4) It was wrong for Ooi to submit that MBB failed to mitigate its loss by not suing Mahdi. The evidence showed that MBB made efforts to trace the monies deposited into Mahdi's account but by the time Ooi's wrongful act was discovered, the monies had been further disbursed by Mahdi to third parties and those monies were either spent or the accounts of the third parties had been closed. Only if MBB had not made any efforts at all to trace the monies in Mahdi's account would it be fair to say that it had not taken reasonable steps to mitigate its loss. But, as shown by the evidence, this was not the case. In any event, mitigating a loss did not mean that legal action must have been taken against others who were equally liable as Ooi. The trial judge did not err in holding that by entering into the settlement agreement with Hamidah, MBB had mitigated its loss to RM3.3m. If MBB had waited for Hamidah to sue, its loss might have exceeded that amount (see paras 39–41 & 44–46).

(5) MBB's failure to call Mahdi, Afkariah and Fauziah as witnesses at the trial did not affect its case. The three were not required for MBB to prove its case of breach of duty of care and negligence on Ooi's part. There was sufficient oral and documentary evidence at the trial to establish MBB's case against Ooi. Likewise, there was no basis for Ooi to submit that by not calling those three persons an adverse inference should be invoked against MBB. As they were not needed to prove MBB's claim, it could not be said that MBB had withheld evidence (see paras 47–48).

[Bahasa Malaysia summary

Mahkamah Tinggi telah membenarkan tuntutan responden terhadap perayu ('Ooi') kerana melanggar terma dan syarat kontrak perkhidmatannya dan melanggar kewajipan berjaga-jaga terhadap responden ('MBB') apabila beliau adalah pengurus cawangannya. MBB mendakwa bahawa tanpa pengetahuan dan persetujuannya, Ooi telah menjalankan skim pelaburan bersama dengan dua orang yang lain ('Afkariah' dan 'Fauziah') untuk memujuk pelanggan bagi memasukkan wang mereka ke dalam simpanan tetap ('FD') di cawangannya dengan perjanjian bahawa mereka akan mendapatkan pulangan yang lebih baik daripada mereka menyimpan wang mereka di cawangan MBB lain. Sehubungan dengan skim tersebut, seorang pelanggan ('Hamidah') telah membuka akaun FD di cawangan Ooi di mana RM3.3 juta telah didepositkan. Walau bagaimanapun, tanpa persetujuan Hamidah, FD kemudiannya telah dibuka dan RM3.3 juta telah dipindahkan ke akaun orang lain ('Mahdi'). MBB mendakwa bahawa prosedur perbankan biasa tidak diikuti dalam pembukaan FD dan kemasukkan wang ke dalam akaun Mahdi. Hamidah membuat laporan polis dan menuntut MBB mengembalikan RM3.3 juta kepadanya. MBB cuba mengesan ke mana perginya RM3.3 juta tersebut tetapi telah mendapati bahawa wang telah hilang pada masa ia menjalankan siasatan terhadap kes tersebut. Selepas siasatan, MBB memberhentikan perkhidmatan Ooi dengan serta merta. MBB memeterai perjanjian penyelesaian dengan Hamidah untuk membayar RM3.3 juta secara penyelesaian penuh dan akhir bagi tuntutannya tanpa pengakuan liabiliti terhadap pihaknya. Tuntutan MBB terhadap Ooi adalah secara khusus berkaitan dengan RM3.3 juta yang telah dibayarnya kepada Hamidah. Mahkamah Tinggi berpendapat bahawa Ooi bertanggungjawab untuk membayar MBB jumlah tersebut setelah mendapati bahawa beliau telah melanggar kewajipan berjaga-jaga terhadap MBB dan gagal menjalankan jagaan, hemah dan kemahiran yang diperlukan oleh pengurus cawangan dalam membenarkan wang FD Hamidah dilenyapkan dan dengan itu menyebabkan MBB menanggung kerugian. Dalam rayuan semasa terhadap keputusan tersebut, Ooi berpendapat, antara lain, bahawa MBB telah memasuki perjanjian penyelesaian dengan Hamidah dengan sendirinya dan ia tidak seharusya mendapatkan kembali RM3.3 juta dari beliau kerana: (a) beliau tidak diwajibkan membayar balik MBB di bawah mana-mana peruntukan ganti rugi; (b) beliau tidak cuai; (c) oleh kerana perjanjian penyelesaian mengecualikan pengakuan liabiliti di pihak MBB, beliau

dilepaskan dari sebarang liabiliti; (d) Mahdi, Afkariah dan Fauziah tidak pernah dipanggil sebagai saksi semasa perbicaraan; (e) MBB tidak mengambil langkah sewajanya untuk mengurangkan kerugiannya; dan (f) MBB gagal membuktikan bahawa ia sebenarnya mengalami kerugian sebanyak RM3.3 juta. Sebagai menjawab, MBB berpendapat bahawa mahkamah perbicaraan telah menilai kesemua bukti dengan tepat dan dapatan serta keputusannya tidak seharusnya diganggu.

Diputuskan, dengan sebulat suara menolak rayuan:

(1) MBB dengan tepat dalam membuktikan tuntutannya terhadap Ooi. Ooi tidak dapat menunjukkan bahawa dapatan, pertimbangan dan keputusan Mahkamah Tinggi tidak dipertahankan. Tidak ada alasan untuk mengganggu dapatan fakta dan keputusan yang dibuat oleh Mahkamah Tinggi (lihat perenggan 23 & 50).

(2) Ooi gagal memplidkan bahawa kerana perjanjian penyelesaian secara tersurat melepaskan tanggungjawab pada pihak MBB, beliau tidak bertanggungan atas pembayarannya kepada Hamidah. Ooi juga gagal memplidkan keperluan bagi MBB untuk memulakan tindakan ganti rugi atau tuntutan pihak ketiga terhadapnya. Kelalaian Ooi untuk memplidkan pembelaan ini bermaksud tuntutan MBB harus dipertahankan oleh mahkamah. Ianya merupakan asas prinsip perundangan bahawa suatu perkara harus diplidkan supaya ianya boleh diadili dan diputuskan oleh mahkamah (lihat perenggan 29–32)

(3) Mahkamah Tinggi telah dengan tepat dalam dapatan bahawa MBB telah mengalami kerugian sebanyak RM3.3 juta yang merupakan jumlah yang dibayarnya kepada Hamidah akibat daripada kecuaian Ooi. Oleh itu, tidak ada alasan untuk Ooi menghujahkan bahawa MBB tidak dapat membuktikan kerugiannya sebanyak RM3.3 juta (lihat perenggan 37).

(4) ianya adalah salah bagi Ooi untuk menyatakan bahawa MBB telah gagal mengurangkan kerugiannya dengan tidak menyaman Mahdi. Bukti menunjukkan bahawa MBB telah berusaha untuk mengesan wang yang telah dimasukkan ke dalam akaun Mahdi tetapi pada saat tindakan curang Ooi diketahui, wang tersebut telah dilepaskan oleh Mahdi kepada pihak ketiga dan wang tersebut telah digunakan atau akaun pihak ketiga telah ditutup. Hanya sekiranya MBB sama sekali tidak melakukan sebarang usaha untuk mengesan wang dalam akaun Mahdi, adakah wajar untuk mengatakan bahawa ianya tidak mengambil langkah yang sewajarnya untuk mengurangkan kerugiannya. Tetapi, seperti yang ditunjukkan oleh bukti, ini tidak berlaku. Dalam erti kata lain, mengurangkan kerugian tidak bermaksud tindakan undang-undang mesti diambil terhadap orang lain yang sama-sama bertanggungan seperti Ooi. Hakim perbicaraan tidak terkhilaf kerana dengan memasuki perjanjian penyelesaian dengan Hamidah, MBB telah mengurangkan

kerugiannya kepada RM3.3 juta. Sekiranya MBB menunggu Hamidah menyaman, kerugiannya mungkin melebihi jumlah tersebut (lihat perenggan 39–41 & 44–46).

(5) Kegagalan MBB memanggil Mahdi, Afkariah dan Fauziah sebagai saksi semasa perbicaraan tidak mempengaruhi kesnya. Ketiga-tiganya tidak diperlukan oleh MBB membuktikan kes pelanggaran tugas berjaga-jaga dan kecuaian oleh Ooi. Terdapat bukti lisan dan dokumen yang mencukupi semasa perbicaraan untuk membuktikan kes MBB terhadap Ooi. Pada masa yang sama, tidak ada asas bagi Ooi untuk menyatakan bahawa dengan tidak memanggil ketiga-tiga orang tersebut, andaian memudaratkan harus dibangkitkan terhadap MBB. Oleh kerana mereka tidak diperlukan untuk membuktikan tuntutan MBB, ianya tidak boleh dikatakan bahawa MBB telah menyembunyikan bukti (lihat perenggan 47–48).]

Cases referred to

Afareez bin Abdul Razak v Mohd Burhan bin Ibrahim [2018] MLJU 1467, HC (refd)

Alliance Bank (M) Bhd v Lim Seng Tak [2014] 10 CLJ 149, HC (refd)

Amanah Scotts Properties (KL) Sdn Bhd v Ooi Meng Khin & Ors [2012] 1 LNS 487, HC (refd)

Dato' Hamzah bin Abdul Majid v Omega Securities Sdn Bhd [2015] 6 MLJ 725, FC (refd)

Foo Sam Ming v Archi Environ Partnership [2004] 1 MLJ 449; [2004] 1 CLJ 759, CA (folld)

Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals [2015] 1 MLJ 773; [2015] 1 CLJ 719, FC (refd)

K Siladass (claiming as a law firm partner practicing under the name K Siladass & Partners) v CIMB Bank Bhd [2015] 4 MLJ 818, CA (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)

Leong Yoong v Lee Sem Yoong [1968] 2 MLJ 72, FC (refd)

Lister v Romford Ice and Cold Storage Co Ltd [1957] AC 555, HL (refd)

Malayan Banking Bhd v Basarudin bin Ahmad Khan [2007] 1 MLJ 613; [2007] 1 CLJ 309, FC (refd)

Maybank Investment Bank Berhad v Hamzah Mahmood & Anor [2014] 6 CLJ 753, HC (refd)

Nu-Con System Sdn Bhd v Ng Say Heng [2011] MLJU 1209; [2011] 1 LNS 1604, HC (refd)

Pan Malaysian Pools Sdn Bhd v Kwan Tat Thai & Anor and other appeals [2018] 4 MLJ 461; [2018] 4 CLJ 323, CA (refd)

RHB Bank Bhd v Isa Abu Bakar & Anor [2012] 9 CLJ 950, HC (refd)

A *Stott v West Yorkshire Road Car Co Ltd and another, Home Bakeries Ltd and another third parties* [1971] 2 QB 651, CA (refd)
Tan Hock Keng v L & M Group Investment Ltd [2001] 4 SLR 428, HC (refd)
Thor Eagle Maritime Agencies v lnnovest Bhd [2009] 6 MLJ 74, HC (refd)

B **Appeal from**: Civil Suit No 22NCVC-701–12 of 2015 (High Court, Kuala Lumpur)

M Manoharan (M Manoharan & Co) for the appellant.
Janice Leo (Zarqali Mohd Noor with her) (Steven Thiru & Sudhar Partnership) for
C *the respondent.*

Abu Bakar JCA:

INTRODUCTION

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[1] This is an appeal against the decision of the learned judicial commissioner ('JC') at the High Court who had allowed the claim of Malayan Banking Bhd, the respondent against its own employee, the appellant in the present appeal.

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[2] Aggrieved by the decision at the High Court, the appellant is before us to reverse the judgment of the learned JC.

F **[3]** This case involves largely the claim by the respondent for breach of the terms and conditions of the contract of service and breach of the duty of care by the appellant.

BACKGROUND FACTS

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[4] The appellant was the branch manager at the respondent's Kepong branch. The appellant is said to have breached his contract of employment with the respondent. He is also alleged to have been negligent in breaching the duty of care owed to the respondent.

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[5] The appellant's breaches were all said to have occurred arising from an unauthorised investment scheme to entice customers to deposit their moneys in the Islamic fixed deposits ('FD'), particularly at the Kepong Branch. It was supposed to offer better returns than depositing it at the respondent's other
I branches. A few of the respondent's customers had withdrawn their moneys in the other branches and other banks to deposit the same in the Kepong branch.

[6] The appellant is said to have collaborated with one Dr Afkariah bt Md Noraini ('Afkariah') and one Fauziah bt Mohd Mahfodz ('Fauziah') to attract

and persuade customers to deposit their moneys in the FD pursuant to this scheme. The respondent alleged that the appellant, Afkariah and Fauziah had misled and misrepresented to potential customers that the investment scheme was linked to the respondent. The respondent in turn denied any link to this scheme.

[7] Afkariah was the financial consultant of one Dato' Hamidah bt Osman ('Hamidah'). It is alleged that the appellant, being the branch manager of Kepong, had worked together with Afkariah to open an FD account for Hamidah in this scheme. In total, a sum of RM3.3m was deposited in this FD account for Hamidah. Subsequently, Afkariah forwarded the necessary documents requesting the FD belonging to Hamidah to be uplifted. The appellant sent the relevant documents to the Fixed Deposit Department for processing of the same. Also submitted by Afkariah is the purported request by Hamidah that the whole amount of RM3.3m for the FD be deposited in the bank account of one Mahdi bin Ahmad ('Mahdi'). The respondent alleged the appellant wrongly approved and authorised that Hamidah's FD be uplifted and that the moneys be deposited into the bank account of Mahdi.

[8] An internal investigation was done by the respondent and the investigation revealed, among others, that the appellant failed to follow standard operating procedures ('SOP') laid down for the opening and uplifting of the FD. Eventually, as a consequence of the investigation, the appellant was dismissed with immediate effect by the respondent.

[9] Hamidah lodged a police report and made a complaint to the respondent that she had not authorised and consented for her FD to be uplifted. She also denied the signature on the reverse of the FD receipts was hers. She also demanded the return of all her moneys of RM3.3m from the respondent.

[10] As a result, the respondent executed a settlement agreement with Hamidah. In this agreement, the respondent agreed to pay Hamidah that amount of RM3.3m without any admission of liability and as a full and final settlement of any claims by the latter. It is a term in this agreement, with the payment of this amount to Hamidah, it is deemed that the loss incurred by her shall be deemed to be settled in full without any admission of liability on the part of the respondent and any allegations made by her about the FD shall be deemed to be irrevocably and unconditionally withdrawn. It is also agreed in this agreement (cl 4.1(j))) that the respondent and Hamidah have not committed any event of default under the terms and conditions of the FD account.

[11] The respondent's prayers in its statement of claim are specifically for losses said to have been suffered by the respondent in relation to this uplifting

of the FD and the consequent depositing of the moneys in Mahdi's bank account. As such, the claim is specific to the loss that the respondent had to incur in paying Hamidah that amount of RM3.3m arising from the alleged appellant's breaches of the contract of employment and duty of care. The respondent did not claim against the appellant in respect of other customers regarding their FDs.

HIGH COURT'S DECISION

[12] In essence, the learned JC decided in favour of the respondent based on the grounds as follows:

(a) the appellant allowed the investment scheme to be carried out without the respondent's knowledge and consent;

(b) the appellant issued invitation letters to the respondent's customers to open FD's accounts and this is not in line with the respondent's SOP which does not require such letters to be issued;

(c) customers were offered a higher interest rate for the FD compared to other respondent's branches;

(d) in opening Hamidah's FD account, the appellant did not follow the SOP, among others for Hamidah to fill the FD application form and for identity verification to be done and to take specimen signatures of Hamidah;

(e) the appellant instructed its Kepong branch's opening account executive and the operations officer to open Hamidah's FD account;

(f) the appellant in testifying, admitted he did not ask to see the letter of authorisation from Hamidah for the latter's FD to be uplifted and in the closing of the same;

(g) the appellant also testified he did not call Hamidah to confirm the latter truly wanted to uplift the FD and to close the FD account;

(h) the uplifting of the FD and the moneys deposited in Mahdi's bank account subsequently were made possible on the instructions of the appellant;

(i) the appellant participated in the unauthorised investment scheme and he admitted in court that he did not check the background of Afkariah and Fauziah;

(j) the appellant owed a duty of care to the respondent, including following procedures laid down in respect of opening and uplifting of the FD account;

(k) the appellant had breached his contract of employment and failed to exercise care, prudence and skill as a branch manager in uplifting Hamidah's FD and depositing the money into Mahdi's bank account;

(l) the respondent suffered loss and damage of RM3.3m because the FD was wrongfully uplifted; and

(m) the appellant was ordered to pay special damages for that amount.

THE APPELLANT'S SUBMISSION

[13] For the appeal, the appellant in gist contended as follows:

(a) since the respondent's claim is not founded on indemnity, the respondent cannot be paid RM3.3m by the appellant;

(b) the respondent on its own accord had settled with Hamidah;

(c) the payment of RM3.3m to Hamidah was not the result of the negligence of the appellant;

(d) the settlement agreement absolved the appellant from all liabilities whatsoever;

(e) the respondent itself agreed to the execution of the settlement agreement and paid RM3.3m without any admission of liability;

(f) the respondent did not reserve its right to reimbursement of the said sum from the appellant upon signing of the settlement agreement;

(g) the settlement agreement meant that the respondent could not sue the appellant as the payment of RM3.3m by the respondent to Hamidah was without any admission of liability of the respondent, which must include the appellant;

(h) with the settlement agreement, Hamidah wrote that the respondent was not liable and not negligent;

(i) there is no proof of loss of profit and no loss of income for the alleged breaches of the appellant;

(j) there is no clause regarding indemnity in the appellant's contract of service for him to be liable in paying that amount of RM3.3m;

(k) Mahdi was not called as a witness for the respondent;

(l) the respondent did not attempt to recover the sum from Mahdi and did not mitigate its losses as no court action was taken against him;

(m) Afkariah and Fauziah were also not called as witnesses;

(n) no evidence that Hamidah was deceived to participate in the investment scheme; and

(o) respondent did not prove damages of RM3.3m as this amount was settled with Hamidah and this is not an actual loss.

THE RESPONDENT'S SUBMISSION

[14] The respondent's arguments for appeal can be summarised as follows:

(a) the appellant uplifted Hamidah's FD without her knowledge and consent;

(b) the appellant facilitated the uplifting of the FD without following the SOP;

(c) the appellant transferred the RM3.3m to Mahdi's bank account without Hamidah's authorisation;

(d) the appellant owed a contractual duty of care to the respondent pursuant to his contract of employment including complying with internal policies, guidelines and SOP;

(e) the appellant must exercise reasonable care, prudence and skill in the perform ance of his duties;

(f) on the balance of probabilities the appellant failed to comply with the SOP for the opening and uplifting of Hamidah's FD;

(g) the appellant's failure to comply with the SOP resulted in the breach of his contract of service and breach of duty of care owed to the respondent;

(h) the respondent had to enter into the settlement agreement and pay the amount RM3.3m to Hamidah; and

(i) the respondent suffered a loss for that amount due to the appellant's failure in his contractual duty, negligence and in breaching his duty of care to the respondent.

OUR ANALYSIS AND DECISION

[15] Having perused and studied the grounds of judgment of the learned JC, we are of the considered view that the reasons and findings made by the JC in allowing the respondent's claim should not be set aside. The reasons and findings made by the learned JC are supported by the evidence tendered and the law applicable before the lower court. With respect, the appellant had not shown that the learned JC had erred in any way in appreciating the whole evidence presented by both parties.

[16] In this regard, the Court of Appeal's case of *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19 pointed out the scope of the appellate court in reviewing the decision of the lower court

and it states as follows:

> Very recently, this court in *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon and other appeals* [2003] 1 MLJ 567 reviewed some of the leading authorities on appellate intervention and identified the general rule of appellate non-interference. We also considered some of the categories in which appellate interference is warranted. We find it unnecessary to repeat what we said there. *Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision*. (Emphasis added.)

[17] Having said that, uppermost to be addressed is the duty of care that is owed by the appellant to the respondent as an employee of the latter. The appellant must exercise proper care and skill in a master and servant relationship that existed with the respondent.

[18] In the Federal Court's case of *Malayan Banking Bhd v Basarudin bin Ahmad Khan* [2007] 1 MLJ 613; [2007] 1 CLJ 309, the common law position in respect of such relationship is well recognised and the decision of the House of Lords in *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555 was approvingly quoted where the following was said:

> *The common law demands that the servant should exercise his proper skill and care in the perform ance of his duty: the graver the consequences of any dereliction, the more important it is that the sanction which the law imposes should be maintained. That sanction is that he should be liable in damages to his master*: other sanctions there may be, dismissal perhaps and loss of character and difficulty of getting fresh employment, *but an action for damages, whether for tort or for breach of contract, has, even if rarely used, for centuries been available to the master*, and now to grant the servant immunity from such an action would tend to create a feeling of irresponsibility in a class of persons from whom, perhaps more than any other, constant vigilance is owed to the community. This was, I think, an aspect of the case which made a special appeal to Romer LJ It cannot be disregarded. (Emphasis added.)

[19] This case drives home the point that quite apart from a written contract of service, the appellant owes a duty under common law to exercise reasonable care and skill in his employment with the respondent. Any breach of that duty will result in the respondent being entitled to claim damages against the appellant.

[20] The duty in this regard on the part of the appellant, obviously would include adhering to and complying with, the SOPs already laid down by the respondent in respect of the opening, maintaining, closing and general supervision of clients' FDs.

[21] In the case of *Maybank Investment Bank Berhad v Hamzah Mahmood & Anor* [2014] 6 CLJ 753 it has been said that the bank's employees in this case, were under a contractual obligation to comply with internal policies and guidelines of the bank. Similarly, the appellant in the present appeal ought to be bound by the SOPs set by the respondent in respect of the operation of the FDs.

[22] In *Alliance Bank (M) Bhd v Lim Seng Tak* [2014] 10 CLJ 149 it was also decided that a single act of negligence would give rise to a claim by the employer bank for special damages either in tort or for breach of contract against an assistant branch manager of a bank.

[23] Having highlighted the duty reposed in the appellant by the respondent, we could not see any reasons to disturb the finding of fact made by the learned JC that this duty has been breached by the appellant and thereby, caused a loss to the respondent.

[24] There are no reasons too for the finding by the learned JC to be reversed when it is found that the appellant had breached his contract of employment and failed to exercise due care, prudence and skill as a branch manager in uplifting Hamidah's FD and depositing the money in Mahdi's bank account.

[25] In view of the finding by the learned JC that the appellant had failed to exercise care and was negligent in the perform ance of his duties, the learned JC was correct to award damages against the appellant.

[26] Umi Kalthum Abd Majid J (as Her Ladyship then was) in *RHB Bank Bhd v Isa Abu Bakar & Anor* [2012] 9 CLJ 950 awarded special damages amounting to RM8.25m against the ex-employees of the bank for negligence and breach of their contractual duty of care for misappropriation of monies.

[27] Suraya Othman J (now JCA) in *Nu-Con System Sdn Bhd v Ng Say Heng* [2011] MLJU 1209; [2011] 1 LNS 1604 allowed special damages against the defendant as he had breached his contractual duty in acting beyond the authority entrusted to him.

[28] Lee Swee Seng JC (now JCA) in *Amanah Scotts Properties (KL) Sdn Bhd v Ooi Meng Khin & Ors* [2012] 1 LNS 487 allowed the plaintiffs claim for, inter-alia, breach of contract and negligence against the respective defendants for unlawful siphoning of monies in the sum of RM31m.

[29] As explained earlier, the appellant had argued that the respondent could not sue the form er as the respondent had executed the settlement agreement

with Hamidah without any admission of liability. In respect of this defence, the learned JC had not erred in not addressing the effect of this term. The learned JC did not at all consider what these words would mean or give any interpretations at all on the same because this was not pleaded by the appellant at all. It is most unfortunate and regrettable that the respondent did not plead this possible defence at all in the statement of defence. The appellant failed to assert in his statement of defence that because the teRMof the settlement agreement states there is no liability on the respondent, the appellant should also not be made liable for the payment to Hamidah.

[30] And in this regard, it is also relevant to note that the appellant completely failed to plead in his statement of defence the need for the respondent to request or initiate an action for indemnity or a third party claim against the appellant.

[31] The omission of the appellant to plead these defences should mean that the claim of the respondent must be sustained by this court.

[32] In this regard, there are various case law affirming the fundamental principle that a matter must be pleaded for it to be litigated and decided by the courts. The importance of pleadings can be seen in two Federal Court's cases of *Dato' Hamzah bin Abdul Majid v Omega Securities Sdn Bhd* [2015] 6 MLJ 725 and *Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals* [2015] 1 MLJ 773; [2015] 1 CLJ 719.

[33] It is in any event appropriate for the respondent to quote the Court of Appeal's case of *K Siladass (claiming as a law firm partner practicing under the name K Siladass & Partners) v CIMB Bank Bhd* [2015] 4 MLJ 818 regarding this possible defence. In this case, the facts are quite similar to the facts in the present appeal. In this case the issue was whether when the defendant had settled the claim of the plaintiff 'without admission of liability' and the latter as a result withdrew the claim, the defendant could sue a third party based on the facts between the defendant and the plaintiff. The Court of Appeal had followed the English case of *Stott v West Yorkshire Road Car Co Ltd and another, Home Bakeries Ltd and another third parties* [1971] 2 QB 651 to find that despite those words, a third party can still be sued and be held liable.

[34] *K Siladass* followed that English case and considered the effect of that crucial and significant words 'without admission of liability' stated in the settlement and said as follows:

> However that does not detract from the fact that the appellant effectively accepted

responsibility in law for the loss suffered by the plaintiff and made good that loss to the extent of RM125,000'. To that extent therefore it is clear that he was effectively 'liable' or 'responsible in law' to the plaintiff in that sum of money.

[35] Further it is said as follows:

> It therefore follows that having accepted such responsibility in law, he is entitled to seek contribution from the respondent third party bank who is another or joint tortfeasor.

[36] Therefore, even when the settlement agreement between the respondent and Hamidah contained the words 'without any admission of liability', this would not assist the appellant in any manner as the respondent could still maintain a suit against the appellant.

[37] Evidence was also tendered before the High Court that the appellant failed to comply with the guidelines and SOPs pertaining to the uplifting of Hamidah's FD. And evaluating this evidence, the learned JC correctly found that this had resulted in the respondent's loss of RM3.3m as this amount had to be paid to Hamidah as a consequence of the negligence of the appellant. This is indeed a loss to the respondent and hence, there is absolutely no concrete reason for the appellant to submit that the respondent did not prove damages of RM3.3m as this amount was settled with Hamidah and this is not an actual loss.

[38] In this regard, there is nothing wrong for the learned JC to find as follows:

> The Defendant's breach of his contract of employment and his failure to exercise reasonable care, prudence and skill in the perform ance of his duty as a branch manager had caused the Plaintiff to suffer loss in the sum of RM3.3m being the sum the bank had to pay to Data Hamidah pursuant to the Settlement Agreement for the unlawful upliftment of her FD account.

[39] On the submission by the appellant that the respondent had failed to mitigate its losses, the learned JC had found as follows:

> The amount of RM3.3m paid by the Plaintiff to Data Hamidah in settlement of her claim for the unauthorised upliftment of her FD certificates was reasonably foreseeable and arose naturally in the usual course of things from the Defendant's breach of his contract of employment with the Plaintiff. The alternative option for the Plaintiff would be to wait for Data Hamidah to bring a civil action against the Plaintiff for the unauthorised upliftment where the Plaintiff would likely have to pay Data Hamidah a higher amount of damages than the initial RM3.3m banked in the FD accounts.
>
> The additional sum payable would have been the loss of interest/profit for early

upliftment of the FD certificate, interest chargeable from date of incident to date of settlement of judgment sum plus the cost of litigation. *By entering into the Settlement Agreement with Data Hamidah, the Plaintiff mitigated its loss to RM3.3m* (Emphasis Added.)

[40] The above finding by the learned JC on mitigating the loss is correct based on the facts in this case. This is consistent with the Federal Court's case of *Leong Yoong v Lee Sem Yoong* [1968] 2 MLJ 72 where it is said as follows:

> The question of what is reasonable for a plaintiff to do in mitigation of his damages is not a question of Jaw, *but one of fact in the circumstances of each case*, the burden of proof being upon the defendant' (see Halsbury, Vol 11, (3rd Ed) para 476 at p 290). (Emphasis added.)

[41] From the above apex court's decision, it is abundantly clear that the peculiar facts of each case must be analysed to determine whether reasonable effort had been undertaken by the plaintiff in mitigating the loss suffered. Thus, in finding that the losses suffered could be more if the respondent is to wait for a suit from Hamidah, the learned JC did not err in the conclusion that the respondent had mitigated the loss.

[42] In fact, settlement agreements have been dealt with in at least two reported cases to suggest mitigation of losses. One such case is *Thor Eagle Maritime Agencies v Innovest Bhd* [2009] 6 MLJ 74 where it states:

> The plaintiff did not adduce evidence to show the losses were mitigated to reduce damages. However, the plaintiff had made attempts to mitigate losses and *more importantly the plaintiff had proposed a settlement sum of USD80,000 as full and final settlement of the plaintiff's claim*. On the facts of the case it was just and equitable to assess damages to be the proposed sum of USD80,000. (Emphasis added.)

[43] Another case that indicates that a settlement agreement can amount to an effort in mitigating a loss is the case of *Afareez bin Abdul Razak v Mohd Burhan bin Ibrahim* [2018] MLJU 1467 where the following was said:

> Last but not least, the plaintiff submitted that despite being given a chance to mitigate the losses suffered by the plaintiff, *D24 refused to apologise openly or to discuss for an amicable settlement without going through the court's process*. (Emphasis added.)

[44] With respect, it is also wrong for the appellant to submit that the respondent did not mitigate its loss as it did not sue Mahdi. Evidence was tendered by the respondent indicating that efforts were made to trace the moneys deposited into Mahdi's bank account but by the time the wrongful act of the appellant was discovered, the moneys had been further disbursed by Mahdi to third parties. And these moneys were either spent or the accounts of

the third parties closed. In fact, what was done by the respondent shows that it had rightly followed the principle laid down by the Court of Appeal's case of *Pan Malaysian Pools Sdn Bhd v Kwan Tat Thai & Anor and other appeals* [2018] 4 MLJ 461; [2018] 4 CLJ 323 where it states:

> *... a duty is cast upon the plaintiff to mitigate or minimise the damages, that is, to take all reasonable precautions to reduce the amount of loss or damage arising from the wrongful act of the defendant*. Any loss or damage, which with the exercise of reasonable care the plaintiff could have avoided, will be deemed too remote to be recoverable. (Emphasis added.)

[45] Only if the respondent made no efforts at all to trace the moneys in Mahdi's bank account, would it be fair to say that the respondent had not taken reasonable steps to mitigate its loss. But, as shown by evidence, this is not the case against the respondent. Thus, this shows that the respondent had taken reasonable steps towards mitigating its loss.

[46] In any event, it is fundamental to note, mitigating a loss does not mean that a legal action must also be taken against others who are equally liable as the appellant. On this point, a case not cited by the respondent although relevant is the Singapore's case of *Tan Hock Keng v L & M Group Investment Ltd* [2001] 4 SLR 428. Dealing with mitigating a loss, S Rajendran J said:

> It is also established law that a plaintiff need not take steps to recover compensation for his loss from parties who, in addition to the defendant, are liable to him (see McGregor on Damages (16th Ed) para 329).

[47] Turning to the issue raised by the appellant that the respondent failed to call Mahdi, Afkariah and Fauziah as witnesses, we are of the view this has not affected the respondent's case. The three are not needed for the respondent to prove its case of breach of the duty of care and negligence on the part of the appellant. Sufficient oral and documentary evidence have been tendered before the High Court to establish the respondent's case against the appellant.

[48] Likewise, there is no basis for the appellant to submit that by not calling these three individuals, an adverse inference should be levelled against the respondent. As they were not needed to prove the respondent's claim, it could not be said that the respondent was withholding evidence. In this regard, the case of *Alliance Bank (M) Bhd* states as follows:

> The defendant next contended that adverse inference under s 114(g) of the Evidence Act ought to be drawn against the plaintiff following the failure to call Evelyn Ong and the branch manager Ong Hang Hock as witnesses. *It is well settled that an adverse inference could be drawn only if the defendant could prove that the plaintiff was withholding evidence and not merely on account of failure to obtain evidence* (see *Munusamv Venqadasalam v Public Prosecutor* [1987] 7 CLJ 250;

> [1987] CLJ Rep 221; [1987] 7 MLJ 492; *Yeo Choon Huat v Public Prosecutor* [1998] 1 SLR 217 CA). It was therefore not mandatory for the court to invoke s 114(g) if a witness is not called. The crucial question was whether the witness is indispensable to proving the plaintiffs case on balance of probabilities ... (Emphasis added.)

[49] On the whole, we do not think that appellate intervention is required on our part in disturbing the findings largely on facts made by the learned JC in this case. Therefore we adopt to what was said by the Court of Appeal in the case of *Foo Sam Ming v Archi Environ Partnership* [2004] 1 MLJ 449; [2004] 1 CLJ 759 which reads:

> Viewing the appellant's case as a whole, I find nothing to alter the view I expressed at the outset of this judgment. That this is an appeal on a question of fact. The function of this court in an appeal such as this is well established. It is to defer to the views of the trial judge who had the obvious audio-visual advantage over oral testimony. Indeed it would be quite wrong for this court to interfere in the present case.

CONCLUSION

[50] The respondent had rightly proven its claim against the appellant. The appellant in turn was unable to demonstrate that the findings, reasoning and the decision as a whole of the learned JC could not be sustained.

[51] Therefore, we are unanimous in dismissing the appellant's appeal with costs.

Appeal dismissed with costs.

Reported by Ashok Kumar